SUPREME COURT, U.S.
FILED
AUG
JAMES F. BROWNING, Clerk

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

**No. 347**

FINE FASHIONS, INC.,

*Petitioner,*

v.

CHRIS L. GROSS, District Director of Internal Revenue for the District of Camden, New Jersey, THE UNITED STATES OF AMERICA and PENN GARMENT COMPANY,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

**No.**

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FINE FASHIONS, INC.,

*Petitioner,*

v.

CHRIS L. GROSS, District Director of Internal Revenue for the District of Camden, New Jersey, THE UNITED STATES OF AMERICA and PENN GARMENT COMPANY,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

*To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit (herein called the Court of Appeals) dated June 1, 1961, affirming (with one dissent) a judgment entered July 19, 1960 by the United States District Court for the District of New Jersey (herein called the District Court).

## Opinions Below

The opinion of the Court of Appeals, reported in 290 Fed. 2d 871, and the opinion of the District Court, which has not been reported, appear, respectively, in Appendices A and B hereto.

## Jurisdiction

The judgment of the Court of Appeals, printed in Appendix C, was dated and entered on June 1, 1961. The order of the Court of Appeals denying the petition for a rehearing was dated June 22, 1961 and is printed in Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

## Questions Presented

1. Whether the Government's tax lien against a delinquent taxpayer gives it any greater rights than the taxpayer had in property belonging to others.

2. Whether the taxpayer's prior assignment of all the proceeds of its government contract did not carry with it the cloth made available to taxpayer by petitioner for that express purpose, and even assuming that title to the cloth vested in the taxpayer, whether the taxpayer did not hold the cloth as trustee and incidental to the assignment and not reachable by the tax lien.

3. Whether the Government, by its seizure of petitioner's cloth, in possession of taxpayer for the limited and express purpose of manufacturing nurses

uniforms therefrom under a government contract and the proceeds of which had previously been assigned to a commercial factor, could thwart and destroy the effect of the assignment and convert the strictly limited purpose for which petitioner had made the cloth available to taxpayer, into absolute title in such cloth and subject to the tax lien against the taxpayer.

4. Whether, in consequence of the assignment, even if title to the cloth was in the taxpayer, was not petitioner the purchaser thereof when, following the assignment the petitioner purchased, paid for and made available to taxpayer cloth specifically earmarked only for the performance of the government contract.

## Statutes Involved

Internal Revenue Code—1954

Sec. 6321. LIEN FOR TAXES. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U.S.C. sec. 6321).

Internal Revenue Code—1954

Sec. 6323 (a). INVALIDITY OF LIEN WITHOUT NOTICE. Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judg-

ment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * *

(26 U.S.C. sec. 6323 (a)).

## Statement of the Case

### A. Statutory Background

The jurisdiction of the District Court was invoked under 28 U.S.C. secs. 1346 and 2463. The relief requested is based on 26 U.S.C. secs. 6321 and 6323.

### B. Factual Background

Petitioner, a New York corporation, is a manufacturer of dresses. Some manufacturing is done for it by independent contractors, among which were business entities controlled by one Louis Wolfe, with whom petitioner had done business for several years.

In April 1957, respondent Penn Garment Company, a Wolfe corporation organized in New Jersey, herein called Penn or the taxpayer (which has not appeared in the proceeding) was awarded a government contract to manufacture nurses' uniforms out of specified cloth. Penn tried to buy the needed cloth from Reeves Brothers, Inc., herein called Reeves, a New York piece goods house, but Reeves refused to sell Penn because of its inadequate credit.

Wolfe discussed with petitioner's president, in New York City, the matter of obtaining the specified cloth.

Petitioner informed Wolfe of its willingness to purchase the cloth from Reeves and make it available to Penn. The arrangement is set forth in the Stipulation of Facts, as follows:

> "7. As an accommodation, petitioner informed said Louis Wolfe of its willingness to purchase from Reeves the material, referred to herein as 'blue chambray cloth, required under the contract referred to in paragraph 1 and to make the same *available to Penn solely for the purpose of said contract.*" (Emphasis supplied) (Appendix to record in Court of Appeals, p. 4a, par. 7).

Petitioner was not to receive any profit or service charge for the cloth it would make available but was to be reimbursed only the amount of the precise cost to it of the cloth used up and delivered by Penn under the government contract (CA app. p. 14a).

To assure petitioner reimbursement for the cloth it would thereafter purchase for this purpose, Penn on July 1, 1957 in writing, assigned to Linde Factors Corporation, a commercial factor herein called Linde, all moneys due or to become due under the government contract (CA app. p. 5a, par. 9, Exh. B, p. 9a).

On July 2, 1957, Linde wrote petitioner a letter stating that all moneys payable under the government contract had been assigned to it for the purpose of accumulating funds to pay for the goods purchased from Reeves (CA app. Exh. C, p. 12a).

Thereafter, on October 15, 1957, under two contracts made by petitioner, it purchased from Reeves the specified cloth required for the government con-

tract (one of such purchase contracts is printed in petitioner's Court of Appeals appendix to reply brief, p. 1aa). A total quantity of over 88,000 yards and a purchase price of over $41,000 were involved. The cloth was invoiced by Reeves to petitioner at its office in New York, and pursuant to petitioner's instructions was shipped by Reeves directly to Penn at Penns Grove, New Jersey.

Pursuant to the assignment and the Linde letter, the latter paid petitioner $8,979.70, the exact amount of Reeves' first invoice for cloth which petitioner paid. In addition, petitioner was invoiced by Reeves and paid it the further amount of $23,031.22 as the balance of the cost of the cloth, which has not been repaid to petitioner.

### C. The Present Action

On April 1, 1958 an assessment was made against Penn for taxes due the United States. A levy and distraint was made and all property at Penn's plants in Penns Grove was seized by the Internal Revenue Service. Included were thousands of yards of the cloth made available by petitioner and still unout, a quantity of completed and partially completed uniforms made from the cloth and cases of cut-up cloth.

Petitioner claimed the cloth and the uniforms made therefrom were its property and demanded their release from the levy. This being refused petitioner brought this summary proceeding to nullify the seizure and for the return of the cloth and uniforms.

A hearing was held thereon in the District Court and petitioner's application was denied and the Gov-

ernment held to have valid claims against the cloth. An appeal was taken therefrom to the Court of Appeals which affirmed the District Court (with one dissent). Petitioner's application for a rehearing was denied.

## Reasons for Granting the Writ

The District Court erred in its basic, primary determination that the Government held rights in the cloth greater than those held by Penn. The Court said—

> "There is no doubt as to what the rights would have been between Fine and Penn, but we don't have that here. Here we have the Government in the very sound position of a creditor."

The Court of Appeals erred in failing to consider and to find that even if title in the cloth were in Penn, the latter held the cloth in trust for petitioner, since the primary purpose of the assignment and of petitioner's supplying of the cloth was frustrated and destroyed by the government's seizure. Concomitant to this were the errors in not finding that in the circumstances, Penn held the cloth as incidental to the assignment or that petitioner was a purchaser of the cloth.

The Court of Appeals erred in nullifying the stipulated fact that petitioner was to make the cloth "available to Penn solely for the purpose of said contract" and in holding, instead, that the seizure, beside making completion of the government contract

impossible, had also created absolute title rights in the cloth in favor of the Government.

The Court of Appeals erred in taking out of context the word "guaranteed" from the letter by Linde (CA app. Exh. C, p. 12a) and affirming the District Court's finding that this word alone, showed the intention to be that petitioner "would pledge its credit rating to guarantee payment for the cloth and that title would vest in Penn Garment Company." In so doing the Court of Appeals disregarded the fact that the letter, written not by petitioner but by Linde, contains obvious inaccuracies in referring, in the past tense, to goods "*purchased*" and purchase "*guaranteed*", when there was no purchase until more than 3 months later on October 15, 1957 and there never was a guaranty. It disregards the undisputed facts that there was no pledge of credit by petitioner, that petitioner in its own name bought and paid for the cloth, that the Linde letter was only intended to state Linde's obligation to petitioner for sums Linde would receive under the assignment, and that even if the letter had stated petitioner's intention, that was completely changed 3 months later when petitioner made the cloth purchase contracts in its own name.

The determinations of the Court of Appeals and of the District Court which it affirmed are of widespread importance. The possibility that previously well-defined rights held by a debtor may be grossly enlarged in the hands of the Government if a tax lien is assessed against the debtor requires definitization.

Likewise, the making of assignments in relation to business transactions is of limitless daily occurrence

and if a tax levy prevents fulfillment of the intended assignment, the specific property involved in the assignment should be deemed held in trust for and as incidental to the assignment and beyond the reach of the tax lien.

## POINT I

**If it be assumed that title to the cloth passed to Penn, then in view of the surrounding circumstances (a) Penn was a trustee of the cloth, or (b) it held the cloth as incidental to the assignment, or (c) petitioner was a purchaser of the cloth. In any of these cases, the cloth was immune from seizure for Penn's taxes, and determination by this Court on this score is vitally needed.**

In the dissenting opinion herein critical comment is made regarding the failure of the majority to reach the important question of Penn's trustee obligation to petitioner under the assignment. A pronouncement by this Court is requisite to correct the erroneous determination made through the failure of the Court of Appeals to deal with the matter.

Penn's performance of the Government contract had been frustrated by the seizure of the cloth and this destroyed the effect of the assignment. In such case, even if Penn had title to the cloth, it holds the cloth as a trustee and it does not have such property rights therein as to make the cloth available for payment of its taxes. *Sullivan* v. *Visconti*, 68 N.J.L. 543, 548, 53 Atl. 598 (1902); *In re City of New York*, 197 Misc. Rep. 154, 95 N.Y. Supp. 2d 26 (1950); *Internal Revenue Code* § 6321.

Similarly, the Court of Appeals failed to consider that, again, even if Penn had title, it held the cloth as incidental to and in connection with fulfillment of the assignment. It is well settled that the assignment of the principal obligation carries with it all rights to security and incidentals under the assignment even when these are not specifically referred to in the assignment. This would include the cloth. *In re Halprin*, 280 Fed. 2d 407, 3d Cir. (1960); *Smith* v. *Wagner*, 106 Misc. Rep. 170, 174 N.Y.Supp. 205 (1919); *In re 24-52 Forty-Fourth St. Long Island City*, 176 Misc. Rep. 249, 26 N.Y. Supp. 2d 265 (1941); *Westville Land Co.* v. *Handle*, 112 N.J.L. 447, 457, 171 Atl. 520 (1933); *New Jersey Trust Co.* v. *Sussex County Distillery Co.*, 3 N.J. 156, 158, 69 Atl. 2d 315 (1949).

This language from *Halprin*, supra, is apposite:

> "It is fair that this distinction be utilized to protect persons in the position of Commercial here. It is eminently appropriate that one who finances property-producing transactions be able to look for security to the acquisitions he is making possible. * * * The financing of the performance of a manufacturing contract such as we have here is a transaction essentially similar to a purchase money mortgage; in a real sense, the debt now owed by Doniger was created by funds furnished by Commercial.
>
> "In such circumstances, a federal tax lien tends to defeat its ultimate purpose if it impedes the effective assignment of future earnings as security for funds needed to make such earnings possible. The result of such extension of the tax

collector's reach is likely to be the destruction of the earning power, and with it the tax paying power of the burdened business."

*In re Norman E. Halprin*, 280 Fed. 2d 407, 410, 3d Cir. (1960).

As a concomitant, the assignment by Penn, followed by the furnishing of the cloth by petitioner, made petitioner the purchaser of the cloth as the result of the assignment. In such case, too, the cloth was unavailable to pay Penn's taxes even if it had had title to the cloth. *Internal Revenue Code* sec. 6323, 26 U.S.C. sec. 6323; *Matter of City of New York*, 5 N.Y. 2d 300, cert. den. *sub nom. U.S. v. Coblentz*, 363 U. S. 841 (1960); 9 *Mertens Law of Federal Income Taxation*, sec. 54.45.

None of the foregoing was considered by the Court of Appeals and, in view of the determination adverse to petitioner, the decision carries with it an adverse determination on the matters here presented. Such determination was erroneous and requires correction.

## POINT II

**Penn had only limited rights to use the cloth and title thereto never vested in it. It had no interest in the cloth reachable by the tax lien.**

Under Point I it was assumed that Penn had title to the cloth in order to show the need for the intervention of this Court. In fact, as will be demonstrated below, Penn did not have title to the cloth. Accordingly, the ruling that the Government has greater rights than Penn in petitioner's property urgently

requires the intervention of this Court. Correction is also needed of the erroneous interpretation by the Court of Appeals as to local law regarding petitioner's title in the cloth.

The Government's rights in the cloth under the tax lien were identical with the rights held by Penn. Calling the Government a "creditor" did not increase those rights. The District Court recognized that Penn did not have title to the cloth. Its holding that the Government had title although Penn did not is erroneous. *Stuart* v. *Willis*, 244 Fed. 2d 925, 9th Cir. (1957); *U. S.* v. *Winnett*, 165 Fed. 2d 149, 9th Cir. (1947); *Raffaele* v. *Granger*, 196 Fed. 2d 620, 3d Cir. (1952); *Hobson* v. *U.S.*, 168 Fed. Supp. 117, D.C.E.D. Mich. N.D. (1958); *United States Fidelity & Guaranty Co.* v. *Triborough Bridge Authority*, 297 N.Y. 31 (1947); 9 *Mertens, Law of Federal Income Taxation*, section 54.52.

Determination as to the Government's rights under its lien requires resort to state law. *U. S.* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *Aquilino* v. *U.S.*, 363 U. S. 509 (1960); *U. S.* v. *Bess*, 357 U. S. 51 (1958); *Fidelity & Deposit Co. of Maryland* v. *New York City Housing Authority*, 241 Fed. 2d 142, 2d Cir. (1957).

Under state law, New York or New Jersey, questions of title are determined from the intention of the parties as expressed in the documents, and as shown by the conduct of the parties, the usages of the trade and the circumstances of the case. *New York Personal Property Law*, § 99, subdiv. 2; *Mitchel* v. *Gilmour*, 256 App. Div. 893, 9 N.Y. Supp. 2d 45 (1939); *Donner* v. *Associated Lace Corp.*, 277 App. Div. 697, 102 N.Y. Supp. 2d 755, aff'd. 303 N.Y. 719 (1951);

*Uniform Sale of Goods Law*, *N.J. Stat. Ann.* Title 46, sec. 46:30-24 (2).

It is clear that the parties intended petitioner to retain title. When, as stipulated, petitioner arranged to make the cloth "available *solely* for the purpose of the government contract," and when, later, in conformity, petitioner, in its own name bought and paid for the cloth, it was not intended or permissible that Penn make any other use of the cloth. Penn could not divert the cloth to another use, for example, to sell it and retain the proceeds. That, however, is precisely what the Government here seeks to do. If Penn couldn't, the Government can't.

The restriction on the use of the cloth deprived Penn of the right of disposition, an essential of ownership. Ownership requires that there be "sole and despotic dominion" and "absolute and unrestricted use and control" of the property. *Bruch* v. *Carter*, 32 N.J.L. 554, 561-2 (1867); *Helvering* v. *Elias*, 122 Fed. 2d 171, 172, 2d Cir. (1941). When the cloth reached Penn, it was already burdened with the restriction and earmarked for a specific use and this restriction was never lifted.

All that Penn had was possession, the lowest species of evidence of ownership. *Rawley* v. *Brown*, 71 N.Y. 85, 89 (1877); *Manning* v. *Anderson Galleries, Inc.*, 130 Misc. Rep. 131, 222 N.Y. Supp. 572 (1927). This, however, is only a rebuttable presumption, *Burr* v. *Bloomsburg*, 101 N.J. Eq. 615, 625, 13 Atl. 876, 880 (1927); *In re Buckler*, 227 App. Div. 146, 237 N.Y. Supp. 242 (1929) and only exists where the character of the possession is wholly unexplained, *Bata* v. *Chase*

*Safe Deposit Co.*, 99 N.Y. Supp. 2d 535, 577, aff'd. 279 App. Div. 182, 108 N.Y. Supp. 2d 659, aff'd. 306 N.Y. 96 (1953).

Explanation of the nature of Penn's possession has been fully given. It comes not only from the stipulated facts and the purchase contracts, but also from the fact that no indicia of a sale of the cloth to Penn are present. There was no promise by petitioner to sell, no absolute promise by Penn to purchase and pay for the cloth, and none of the other prequisites of a sale.

The Court of Appeals erred, when to avoid the inescapable conclusion from the foregoing that Penn lacked title, it held that the true intent of the parties was that Fine Fashions, Inc. "would pledge its credit rating to guarantee payment" for the cloth and that title would vest in Penn. This flies squarely in the face of the stipulated and established facts and is not sustained by the record. As stated in the dissenting opinion, it is "clearly erroneous."

There was no guarantee and there was no pledge of credit. There was only an absolute purchase by petitioner and its absolute obligation to pay. The only reference to "guarantee" in the entire record is in Linde's letter. The decision of the Court of Appeals is based entirely on this. The Court of Appeals dealt with the word "guarantee" and the phrase "pledge its credit rating" as though these were terms of abstruse and esoteric meaning. They are easily defined and they do not apply. If, indeed, a guarantee were involved, the question that must be asked is "Who is the principal"? Other than petitioner,

there was none. Penn in no way entered into the cloth purchase contracts made by petitioner. If petitioner had intended to guarantee it could readily have done so. Its intention, as shown by its actions, was to do something entirely different, intending thereby, on advice of counsel, to retain title (CA app. pp. 16a, 19a).

Despite the word "guaranteed" used by Linde in its letter of July 2, 1957 (assuming its mere receipt by petitioner's attorney had any binding effect on it), the transaction as consummated by the principals months later, did not involve a guarantee. In such circumstances it is not what may have been thought months earlier but what the parties actually did which is controlling. *Natco Corp.* v. *U. S.*, 240 Fed. 2d 398, 403, 3d Cir. (1956); *Bruce* v. *McClure*, 220 Fed. 2d 330, 337, 5th Cir. (1955); *Colorado Mining & Elevator Co.* v. *Glenn*, 118 Fed. Supp. 943, 948, D.C.W.D. Ky. (1954).

Finally, the ruling that petitioner "would pledge its credit rating to guarantee payment" made by the District Court and affirmed by the Court of Appeals is absolutely without significance upon the question of title. Presumably extension of credit was involved in petitioner's taking on the obligation of paying for the cloth without first being paid for it. But petitioner did this in its own name and this, by operation of law, gave petitioner title to what it purchased.

## CONCLUSION

**For the foregoing reasons, this petition for writ of certiorari should be granted.**

Respectfully submitted,

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*Attorney for Petitioner*

New York, August 21, 1961

WALLSTEIN, MENSCHEL & WALLSTEIN
BENJAMIN MENSCHEL,
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## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,399

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FINE FASHIONS, INC.,

*Appellant,*

*v.*

CHRIS L. GROSS, District Director of Internal Revenue for the District of Camden, New Jersey, THE UNITED STATES OF AMERICA AND PENN GARMENT COMPANY.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued January 27, 1961

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and KALODNER, *Circuit Judges.*

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### Opinion of the Court

(Filed June 1, 1961)

By MCLAUGHLIN, *Circuit Judge.*

On April 1, 1958 the Internal Revenue Service made a levy and distraint upon personal property in the possession of Penn Garment Company, a New Jersey corporation, at its plants, Penns Grove, New Jersey. The action was taken under Section 6321 of the In-

ternal Revenue Code of 1954, 26 U.S.C. 1958 ed. Sec. 6321, to satisfy a lien in favor of the United States and against Penn for unpaid taxes. Appellant, claiming to be owner of the property, petitioned the court to nullify the seizure and turn the property over to it. The court, holding that Penn was the owner of the property, found its seizure justified.

Penn is a closed corporation owned and controlled by Louis Wolfe and his family. It manufactures women's apparel. On April 12, 1957, it obtained a contract with the Military Clothing and Textile Supply Agency, Philadelphia Quartermaster Depot, to supply 24,321 Air Force nurses' uniforms for a total price of $104,580.30. It sought to obtain the necessary cloth from Reeves Bros. Inc. textile manufacturers. Penn and Reeves agreed on quantity, quality and terms but Reeves would not deliver on Penn's credit alone.

Penn at the time was a contract manufacturer for Fine Fashions, Inc., a New York dress manufacturing corporation which had some garments made for it by independent contractors such as Penn. Fein, president of appellant, precisely gives the reason for helping Penn in his testimony as follows:

> "THE COURT: So in order to keep in good with Wolfe, and his availability as an independent contractor, you went into this arrangement?
>
> THE WITNESS: That is correct, sir.
>
> THE COURT: Is that the sum and substance of it?
>
> THE WITNESS: Yes, sir."

The Stipulation of Facts states: "As an accommodation, *Petitioner informed* said Louis Wolfe of its will-

ingness to purchase from Reeves the material, referred to herein as blue chambray cloth, required under the contract referred to in Paragraph 1 and to make the same available to Penn solely for the purpose of said contract." (Emphasis supplied). The trial court adopted that as its fifth Finding of Fact.

On July 1, 1957 Penn entered into a factoring agreement with Linde Factors Corp., 384 Fifth Avenue, New York 16, N.Y. whereby it assigned to the latter all moneys due or to become due it under the above Quartermaster contract. It covenanted to receive in trust any moneys advanced thereunder to be first applied to payments to claims of subcontractors, et als. arising out of the performance of the contract etc.

On July 2, 1957 there was a conference at the office of Linde Factors. Mahler, treasurer of Linde was present. Stanley Wolfe was there for Penn and Henry Mayersohn, Esq., the attorney for Fine Fashions, was there for his client. During the conference a letter to Fine Fashions from Linde and approved by Penn was given Mayersohn. That reads:

> "We have been directed by Penn Garment Company to retain all moneys received under contract #DA-36-243-QM-(CTM)-33 in the sum of $104,580.30, and which has been assigned to us. The purpose of the foregoing is to accumulate funds for the payment of piece goods purchased from Reeves Bros., and *which purchase was guaranteed by you specifically for this contract.*
>
> "Funds are to be released only to Penn Garment Company, upon written authorization of *your accountant* Maurice Seifert, C.P.A. until all of said purchase invoices have been paid." (Emphasis supplied).

Mr. Mayersohn had that letter in his files until after the seizure of the cloth when he turned it over to Mr. Menschel then representing Fine Fashions. Mr. Menschel asked him as a witness at the hearing below:

> "*What purpose did you seek to accomplish by this letter or to have accomplished by it?*" (Emphasis supplied).

The answer was "To have Linde Factors hold all of the funds received by it pursuant to the contract with the government to be paid, *which money to be paid over to Fine Fashions.*" (Emphasis supplied).

Mayersohn said he was shown the assignment from Penn to Linde and that he knew about it "* * * before July 2nd and subsequent to July 2nd of 1957." Then came the following questions and answers:

> "Q. And what did you do? A. I, in turn, relayed it to Fine Fashions, to Mr. Fein, and told him of the request made by Stanley Wolfe, and *told him that he could place an order for the piece goods, that I had the paper from Linde Factors* and it was *alright for him to place the order for the piece goods at any time he saw fit,* and to purchase it himself.
>
> Q. Was anything said as to the form in which this purchase was to be made? A. Yes, I told him to make the purchase himself.
>
> Q. By himself, you mean in his own company's name? A. In the name of Fine Fashions." (Emphasis supplied).

Fine Fashions bought the cloth from Reeves and had it sent to "Penn Garment Co., Penns Grove, N.J." There was no restriction of any kind in the contract between Reeves and Fine Fashions with respect to delivery by the former to Penn. The latter went to work on its uniforms project and started shipping them out when completed. The finished uniforms were paid for to Linde as delivered. Linde turned over $8,979.70 of the money received to Fine Fashions in accordance with its July 2, 1957 letter to that concern. The latter paid that sum over to Reeves on account of the price of the cloth. Linde also disbursed to Penn, $25,433.75 under the July 2nd letter. On May 7, 1958 and July 12, 1958 Fine Fashions completed its payments to Reeves representing the balance of the cost of the cloth. The levy and distraint by the Director of Internal Revenue upon Penn's personal property had taken place over a month before, on April 1, 1958. Included in the property seized was some cloth as delivered by Reeves, cut up cloth, completed and partially completed uniforms.

Appellant's contention is that it was the purchaser of the cloth from Reeves and occupied no other position regarding the cloth. In the course of this it attempts to completely repudiate the arrangement set out in the July 2, 1957 letter and all thought that it was acting as guarantor for the payment of Reeves' bill. The evidence, and practically all of it is from appellant, does not permit this. The above quoted testimony of appellant's attorney conclusively establishes that the letter satisfactorily detailed the terms under which appellant purchased the cloth for Penn. All moneys received by Penn under its Quartermaster

contract were to be channeled into the factor and by it disbursed to (1) Fine Fashions to reimburse it for what it paid Reeves; (2) Penn for its operating expenses, etc.; finally that Fine Fashions guaranteed Reeves would be paid for its cloth. The testimony of Fein, president of Fine Fashions, supports that of his attorney as to this:

> "Q. Now, what was your intention at the time you made these piece goods available to the Penn Garment Company? A. Those goods were to be made into uniforms.
>
> Q. And then, what was done with them? A. And then they were shipped to the Quartermaster, and the Quartermaster would issue a receipt to Linde from what I understand, and *Linde would pay me for the goods that went into it.*
>
> • • • •
>
> Q. *Well, isn't it a fact that you look directly to Linde for the payment of these piece goods?* A. *Yes.*" (Emphasis supplied).

Once appellant's attorney was satisfied with the assignment of the contract payments from Penn to Linde and "had the paper from Linde Factors" (which was the letter of July 2nd to appellant from Linde) he told the president, Fein, "*that he could place an order for the piece goods,* * * *." (Emphasis supplied).

Nowhere in the record is Mr. Mayersohn's authority to act for Fine Fashions impugned. It was as the result of Linde Factors and Penn carrying out to the letter the procedures directed by Mayersohn and of the latter so advising Fein that Fine Fashions bought the cloth from Reeves and had it sent to Penn. An ineffective effort is made to attack the letter on the

ground that it states "The purpose of the foregoing is to accumulate funds for the payment of piece goods purchased from Reeves and which purchase was guaranteed by you specifically for this contract." The suggestion is that the letter is dated July 2, 1957 and that the cloth was not actually bought until later. Whatever might be said as to whether the first clause could refer to future goods, the transaction outlined in the letter was the protection Fine Fashions desired, obtained and specifically approved in this particular deal. The sort of argument advanced lacks not only substance but is hardly appropriate under the circumstances.

Appellant in its brief misstates the Stipulation of Facts when it asserts "Since under the stipulation of facts petitioner was to make the goods 'available to Penn *solely* for the purpose of said (Quartermaster) contract' (4a emphasis supplied), it is clear that Penn never had the control it would have had as owner." What the Stipulation of Facts really says is:

> "* * * Petitioner (Fine Fashions) *informed* said Louis Wolfe of its willingness to purchase from Reeves the material * * * and to make the same available to Penn solely for the purpose of said contract." (Emphasis supplied). (See full quotation set out supra).

There is not one word from Penn agreeing to this or any other action by it than has been above mentioned.

Appellant urges that there is no question of credibility of witnesses raised. It directly affirms in its reply brief "Such matters as were subject to oral testimony are uncontroverted and uncontradicted."

This is unquestionably correct as far as the evidence of Fein, the president, and Mayersohn, the attorney, heretofore quoted is concerned. That testimony though uncontroverted and uncontradicted might not necessarily have been believed but we cannot fault the district court for accepting it. It seems to us to have the ring of truth.

It follows therefore that appellant's position that "The only basis upon which title in Penn might be presumed is from its bare possession of the cloth." simply avoids the realities of the record in this particular case on appeal.

The district court found that "The true intent of the parties was that Fine Fashions, Inc. would pledge its credit rating to guarantee payment for the cloth and that title would vest in Penn Garment Company." The record factually justifies that conclusion. We cannot say it is erroneous as a matter of law.

The judgment of the district court will be affirmed.

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FINE FASHIONS, INC. *v.* GROSS, *District Director*, No. 13,399.

KALODNER, *Circuit Judge*, dissenting.

I would reverse the judgment of the District Court for the reason that its fact-findings that "The true intent of the parties was that Fine Fashions, Inc. would pledge its credit rating to guarantee payment for the cloth and that title would vest in Penn Garment Company", and "title to the cloth in question

was always in Penn Garment Company" are clearly erroneous.

The marital relationship is not established by the circumstance of their engagement but by the covenant of marriage which binds the betrothed together in the holy state of matrimony.

Here the majority, as did the District Court, looks to the engagement and not to the marriage to ascertain the relationship between the plaintiff, Fine Fashions, Inc. ("Fine"), and the Penn Garment Company ("Penn") with respect to the ownership of the cloth seized by the Internal Revenue Service as Penn's property.

Specifically, the majority and the District Court premised their view that Penn is the owner of the seized cloth on the engagement of Fine on July 2, 1957 to "guarantee" payment for the cloth in the event of it purchase by Penn from Reeves Brothers, Inc. ("Reeves") in complete disregard of the undisputed facts that (1) the "guarantee" arrangement of July 2, 1957 never came to fruition because Penn did not make any purchase from Reeves, and (2) Fine made a direct purchase of the cloth from Reeves on October 15, 1957—three and a half months after the "guarantee" arrangement of July 2, 1957—and later Fine paid Reeves for the merchandise.

The District Court in Par. 8 of its "Findings of Fact",[1] specifically found that Fine purchased the

[1] Par. 8 of the District Court's "Findings of Fact" reads as follows:

> "8. Thereafter on October 15, 1957, the Petitioner entered into two purchase contracts with Reeves Bros., Inc. for the purchase of the required cloth. Said contracts provided for the direct shipment of this cloth to the Penn Garment Company. The total cost of the goods shipped by Reeves Bros., Inc. to Penn Garment Company was $72,010.70, payment to be made by the Petitioners within 70 days after shipment."

cloth here involved from Reeves on October 15, 1957 and that under the terms of the sale payment for the cloth was to be made by Fine to Reeves. This fact finding was supported by the bills of sale of the cloth which were in evidence.

It must be pointed out at this juncture that the District Court, in its Oral Opinion, rendered at the conclusion of the taking of testimony on January 12, 1960, indicated its view that as between Fine and Penn the former was the owner of the cloth.

In its Oral Opinion, the District Court, addressing counsel for Fine, said:

> ". . . I think possibly your argument discloses the weakness to the court of your position, and that is this: that you are greatly imbued, as you have a right to be, *with the position between Fine and Penn. There is no doubt as to what the rights would have been between Fine and Penn, but we don't have that here.* Here we have the Government in the very sound position of a creditor. . . ." (emphasis supplied).

In connection with the foregoing it is appropriate to note that in the final paragraph of its written "Conclusions of Law" the District Court stated:[2]

> "It is further Ordered that as a part of these Findings of Fact and Conclusions of Law that the oral Findings of Fact and Conclusions of Law expressed by the Court at the conclusion of argument on January 12, 1960, and filed herein with the transcript, shall be and become a part of these Findings of Fact and Conclusions of Law."

[2] The Opinion of the District Court is unreported.

It is necessary at this point to sketch in broad outline these undisputed facts which eventuated in the instant litigation.

Fine is a dress manufacturer. In the course of its operation it farms out some of the steps in its manufacturing process to independent contractors. The Wolfe interests controlled some of these independent contractors. Penn, one of the Wolfe enterprises, was a manufacturer of women's apparel. In April, 1957 it obtained a government contract for nurses' uniforms and tried without success, because of its poor credit rating, to purchase the cloth necessary to make the uniforms from Reeves, a New York piece goods house. Wolfe made known Penn's plight to Fine which agreed, on July 2, 1957, as an accommodation to Penn, to "guarantee" payment of the cloth on Penn's purchase of it from Reeves. Earlier, on July 1, 1957, Penn had assigned proceeds of its government contract to Linde Factors Corporation ("Linde"), and arranged with Linde to disburse such proceeds only at the direction of Fine. The purpose of the assignment was to insure an accumulation of funds to pay Reeves for the cloth so that Fine would not suffer a loss by reason of its guarantee. The government was duly notified at the time of the assignment in accordance with the provisions of the Assignment of Claims Act of October 9, 1940, as amended.[3] Fine was also advised by Linde of the assignment by letter on July 2, 1957 and approved of the arrangement between Penn and Linde.

[3] 41 U. S. C. § 15

The Penn purchase-Fine guarantee arrangement was never carried out. Instead, on October 15, 1957, Fine made a direct purchase of the cloth from Reeves on its own credit—payment to be made by it to Reeves in 70 days. Reeves was directed to ship the cloth to Penn. All this appears in the bill of sale set forth in the record. Shipments of the cloth were made in various stages between October 25, 1957 and February 1958. Penn started to make deliveries of the nurses' uniforms to the government in January 1958 and payments with respect to them were made by the government to Linde in accordance wtih the assignment.

On April 1, 1958 the Internal Revenue Service for the District of Camden, New Jersey, made an assessment of some $40,000 for taxes against Penn, and, pursuant to Sections 6321, 6322 and 6323 of the Internal Revenue Code of 1954,[4] levied and distrained on Penn's assets. Included in the property distrained was 16,954 yards of the cloth here involved, 540 completed nurses' uniforms, and a quantity of cut-up cloth. By a Consent Order entered by the District Court on October 1, 1958 a number of the completed uniforms were delivered to the government and the sum of $1,809.50 received in payment was deposited in the Court's registry.[5]

At the time of the distraint Linde had only made available, out of the funds received from the government, $8,979.70, for payment of the cloth, via Fine, to

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[4] 26 U.S.C. Secs. 6321, 6322, 6323.

[5] According to Paragraph No. 15 of the Stipulation of Facts a balance of $6,400 in the possession of Linde was also levied upon by the District Director of Internal Revenue Service, Manhattan District of New York.

Reeves. Fine later paid to Reeves, according to the District Court's Findings of Fact, a balance of $17,021.52 due on its purchase of the cloth. It may be noted parenthetically that Fine, in its brief, says it made an additional payment of $6,009.70.

On May 23, 1958 Fine filed a petition in the District Court to quash the government's distraint. Following hearings, the District Court, sitting without a jury, entered judgment for the District Director of Internal Revenue. This appeal followed.

Fine contends here, as it did below, that it is the legal owner of the cloth seized by the government and that the distraint was ineffectual as to it for that reason, and further urges "that assuming taxpayer [Penn] had title to the cloth" the assignment to Linde (1) made Penn a "trustee" of the cloth, and (2) made the cloth "unavailable for tax liens."

The majority directed its attention only to the contention that Fine is the legal owner of the cloth and concluded that the District Court had correctly held otherwise. It did not consider the other points presented by Fine.

At the outset of this dissent I addressed myself to the majority's holding in this respect. On the score of that holding there is this to be said before proceeding to discussion of the further points presented by Fine:

I disagree with the majority's view that what was agreed to by Fine, Penn and Linde in July 1957 with reference to a "guarantee" is dispositive of the issue of ownership of the cloth at the time of its seizure. It is what took place in October 1957 and not in July 1957 that is dispositive of the issue as to whether Fine was the owner of the cloth involved when it was

seized. The District Court found, as earlier stated, that Fine "entered into two purchase contracts with Reeves Bros., Inc. for the purchase of the required cloth", and that "payment" for the cloth was to be made by Fine to Reeves.[6] It also found that "*Payment for said cloth was made to Reeves Bros., Inc. by Fine Fashions, Inc.*"[7] (emphasis supplied). Having made these Findings the District Court then proceeded to hold in its "Conclusions of Law" (Par. 2) "The true intent of the parties was that *Fine Fashions, Inc. would pledge its credit rating to guarantee payment for the cloth and that title would vest in Penn Garment Company.*" (emphasis supplied).

As the District Court stated this "Conclusion of Law", it is not a "Conclusion of Law" at all but a fact-finding and as such it is utterly inconsistent with the Findings of Fact (Par. 8) that Fine purchased the cloth and (Par. 10) that Fine paid for it. In neither of these two Findings is there any semblance of a "guarantee" nor is there basis in them for a factual finding that "the true intent . . . [was] that title would vest in Penn Garment Company."

The so-called "Conclusion of Law" is further impeached by the District Court's statement to Fine's counsel in its Oral Opinion, earlier quoted:

> " . . . You are greatly imbued, as you have a right to be, with the position between Fine and Penn. *There is no doubt as to what the rights would have been between Fine and Penn, but we don't have that here. Here we have the Govern-*

[6] Par. 8 "Findings of Fact" set forth in Note 1.

[7] Par. 10 "Findings of Fact".

*ment in the very sound position of a creditor . . .*" (emphasis supplied).

A fair inference from this statement is that the District Court, in its Oral Opinion[8] held Fine to be the owner of the cloth as far as Penn was concerned and Penn to be the owner as far as the government was concerned. Well, if Fine was the owner as far as Penn was concerned it was the owner as as far as the government was concerned. The government's right under Section 6321 of the Internal Revenue Code of 1954 rises no higher than the rights of the taxpayer in the property sought to be distrained.

Section 6321 expressly provides that a perfected lien for taxes attaches to "all property and rights to property, whether real or personal, belonging to" a delinquent taxpayer.

Expressing cognizance of the provisions of Section 3621, the District Court, in its Oral Opinion, found that Fine "at no time . . . have what we call property in these goods"; that it had merely extended its "credit on behalf of Penn" and that Penn was at all times the owner of the cloth.

In its written Conclusions of Law (Par. 3) the District Court made the fact finding that "title to the cloth in question was always in Penn Garment Company".

The record affords no support for the findings cited and they are "clearly erroneous".

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[8] As earlier stated, the District Court in its written Conclusions of Law directed that the fact findings made in its Oral Opinion "shall be and become a part of these Findings of Fact and Conclusions of Law."

The bill of sale evidences that the cloth was sold to Fine, the record discloses that Fine paid Reeves for the cloth in consonance with the terms of the bill of sale and the District Court itself found, in Par. 8 of its written Findings of Fact, that Fine "entered into two purchase contracts with Reeves Bros., Inc. for the purchase of the required cloth", and in Para. 10 that "Payment for the cloth was made to Reeves Bros., Inc. by Fine Fashions, Inc."

It must be noted that the District Court in its Oral Opinion indicated that the "control" which Penn had over the cloth evidenced its "ownership". In doing so it said:

> "Control is very close to ownership . . . the ownership is a right to its possession, use, and enjoyment, and to sell or otherwise dispose of it at the will of the owner. The owner is the person in whom is vested that combination, and the title to the property."

It is a fair assumption from the foregoing that the District Court considered Fine's placing of the cloth in the possession of Penn as a vesting of title to the cloth in Penn.

The law to be applied in determining who owned the goods is state law. Aquilino v. United States, 363 U.S. 509, 512-13 (1960); United States v. Bess, 357 U.S. 51, 55 (1958). In the instant case it is the law of New Jersey: although various transactions affecting the physical transfer of the cloth from Reeves to Penn occurred in New York, the cloth is located in New Jersey and the conflict-of-laws rule of that state is that title to personal property is determined by the law of the situs. Schmidt v. Perkins, 74 N.J.L. 785, 67 Atl. 77 (Ct. Err. & App. 1907).

In determining whether Penn had title to the cloth we are to be guided by the intentions of the parties, by the accepted usages of the trade, and by the actual conduct of the parties. Uniform Sale of Goods Law, N.J. Stat. Ann. Title 46, Sec. 46:30-24(2) (1940).

It is clear that Fine acted here as a matter of "accommodation" to Penn in purchasing the cloth from Reeves. Par. 7, Stipulation of Facts; Par. 5, written "Findings of Fact".

Fine did not sell the cloth to Penn; when Penn received the cloth it was not pursuant to any undertaking on its part to pay Fine for the cloth; in other words there was no contract of sale; there was only in substance a consignment of the cloth, owned by Fine, to Penn, for the purpose of its manufacture into nurses' uniforms with ultimate reimbursement to Fine for its cost of the cloth when the government paid for the uniforms.

Consignments are recognized in New Jersey.[9]

One of the critical elements of a consignment is the absence of obligation (as here) on the part of the consignee to pay the consignor for the merchandise it receives. Riedinger v. Mack Mach. Co., 117 N.J. Eq. 334, 175 Atl. 790 (Ch. 1934).[10]

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[9] Riedinger v. Mack Mach. Co., 117 N.J. Eq. 334, 175 Atl. 790 (Ch. 1934); see Shapiro v. Marzigliano, 39 N.J. Super. 61, 120 A. 2d 490 (App. Div. 1956).

[10] In Riedinger v. Mack Mach. Co., where a consignment was involved, the Court said (175 Atl. 793):

> "Lastly, the contract before me lacks the distinguishing feature of a contract of sale, namely, an absolute obligation by the purchaser to pay for the goods"

Another critical element is that the proceeds of the consigned merchandise on its sale must be segregated, 2 Williston, Sales, Sec. 338 (rev. ed. 1948). Here, by Penn's assignment to Linde, the proceeds of the sale of the nurses' uniforms (manufactured from the cloth), were segregated from Penn's general funds.

The emphasis placed by the District Court on Penn's possession of the cloth as evidence of its ownership is in disregard of the New Jersey law that the presumption of ownership from possession is rebuttable, Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954); Burr v. Bloomsburg, 101 N.J. Eq. 615, 138 Atl. 876 (Ch. 1927).

In the instant case Par. 7 of the Stipulation of Facts clearly establishes that Penn's possession of the cloth was for the limited purpose of its manufacture and sale of nurses' uniforms to the government pursuant to the terms of the assignment made to Linde and Linde's letter of July 2, 1957.

Par. 7 reads as follow:

> "As an accommodation, Petitioner [Fine] informed Louis Wolfe [Penn] of its willingness to purchase from Reeves the material, referred to herein as blue chambray cloth, required under the contract referred to in Paragraph 1 and *to make the same available to Penn solely for the purpose of said contract.*" (emphasis supplied).

There isn't an iota of evidence in the record to the contrary.

For the reasons stated I would reverse the judgment of the District Court.

I think these comments must be made:

The Assignment of Claims Act of 1940 as amended May 15, 1951, 65 Stat. 41, provides that where assignment has been made and notice of it given to the government the proceeds of such contract "shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of . . . (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract."

It may well be that the contract between Penn and the government in the instant case contained provisions relating to set-off and if so the levy for taxes would have been invalid as a consequence. Counsel for Fine Fashions, however, neither in the District Court nor on this appeal presented this issue and the failure to do so passeth understanding.

## APPENDIX B

### Opinion of Hon. Thomas M. Madden, *District Judge*

Mr.—you may sit down—Mr. Menschel, I think possibly your argument discloses the weakness to the court of your position, and that is this: that you are greatly imbued, as you have a right to be, with the position between Fine and Penn. There is no doubt as to what the rights would have been between Fine and Penn, but we don't have that here. Here we have the Government in the very sound position of a creditor. Now, therefore, we must view this in the aspect of Fine and the creditor Penn. Now, what do you have? At no time, and the court has not even suggested it, the court has gone back to the hornbook, to the present-day hornbook, for the definition of property. Property is a right and carries with it certain attributes, title, possession, the right to use, to control, to enjoy, the attribute of income therefrom, and those kind of things like the privilege of use. There is only one attribute among many of the bundle of privileges that make it property or ownership, and that is control. Control is very close to ownership, and ownership that is the first equivalent, and that generally understood, the ownership is a right to its possession, use, and enjoyment, and to sell or otherwise dispose of it at the will of the owner. The owner is the person in whom is vested that combination, and the title to the property. One of the tests of ownership of property is the right to dispose, sell, convey, assign, or give it away. Now, I know of nothing in this regard or of any instance that when you origi-

nally purchased the goods on your account from Reeves in order to send them in transit on to the Penn Garment Company that would have immediately stopped Penn from getting them and selling them on the open market. It is true that they were under this Government contract, but if they were to give it up, there was no instrument executed prior to your extension of credit to Penn to give notice to Reeves of an assignment by Penn to you of any and all monies due from the Government that they had a right to collect. So that the court finds in you none of the attributes that we commonly look for when we speak of property and property rights. You don't have possession; you don't have control; you don't have the right to use; you don't have the right to enjoy. You anticipate at no time any of the enjoyments whatsoever out of these goods other than to extend to a person that you had a business relationship with the possibility of aiding them in staying in business so that you would continue to enjoy the type of relationship you had with them, and naturally that would have assisted them. The court can't see how you can spell it out in any other way. It is a mere extension of credit. You extended your credit on behalf of Penn. Now, of course, we have in the record the factoring agreement. The factoring agreement came about by the action of Penn in cooperation with Fein's agent—what was his name, the attorney?

Mr. Menschel: Mayersohn.

The Court: (continuing) . . . Now, among other things in the factoring agreement, is the letter to Fine Fashions, and there is nothing in the record to

disaffirm the statement contained therein, or to disavow it and say that it is not our position. We have many months intervening but the things took place after the writing of the letters from Linde, the factoring agent, to Fine Fashions, and in there it is referred to as a guarantee.

Now, under all the facts and circumstances, Mr. Menschel, I feel sorry for Fine, I really do, but I am not here to decide cases upon sympathy, or anything of that nature. I have to decide them according to the law as I find the law to be coupled with the facts. As I instruct the jury two and two makes four no matter where our passions, prejudices, or sympathies may lie. If two and two adds up to four we are not in position to say it is three or five. The facts of this case lead me to the conclusion that at no time did you have what we call property in these goods, and that the Government moving against Penn Garment Co., being the alter ego of Wolfe, and Wolfe being indebted to the Government substantially and badly for taxes, and ultimately going to jail for his various acts, that the Government was entitled to make its levy, and they are entitled to possession under the various statutes. Your application will be denied. You naturally will have an exception. You will prepare an order. On the motion, we have taken full and complete testimony, it was actually on a motion to dismiss.

## APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,399

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FINE FASHIONS, INC.,

Appellant,

vs.

CHRIS L. GROSS, District Director of Internal Revenue for the District of Camden, New Jersey; UNITED STATES OF AMERICA and PENN GARMENT COMPANY

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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Present: BIGGS, Chief Judge, and MCLAUGHLIN and KALODNER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF

Clerk

June 1, 1961

## APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,399

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FINE FASHIONS, INC.,

Appellant,

v.

CHRIS L. GROSS, District Director of Internal Revenue for the District of Camden, New Jersey, THE UNITED STATES OF AMERICA and PENN GARMENT COMPANY.

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Present: BIGGS, Chief Judge, and MCLAUGHLIN and KALODNER, Circuit Judges.

ORDER

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,

MCLAUGHLIN
Circuit Judge.

Dated: June 22, 1961.